In the Matter of the Compensation of
MICHELLE MILLER, Claimant
WCB Case No. 21-02264
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ceja and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Naugle's order that upheld the SAIF Corporation's denial of claimant's injury claim for a back condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In April 2012, prior to the alleged work injury, claimant underwent an L4-5 decompression and discectomy surgery. (Ex. 3).

On March 31, 2021, claimant, a dispensary nurse, bent over and "yanked" a safe door open in a hurry and heard and felt a pop in her mid-thoracic back, with an onset of muscular pain. (Tr. I: 57, 60, 62, 63). There were two safes at the clinic that claimant opened and closed to get medications for the clinic patients, and she was the only dispensary nurse working that day. (Tr. I: 60).

On April 1, 2021, claimant again was the only nurse working in the clinic, and when she "yanked" open and closed the safe door in the morning she felt out-of-control pain in the same area as the day before. (Tr. I: 60, 62-63, 66). She asked a clinic physician, Ms. Heims, to relieve her of her work duties and saw Ms. Mickle in the hall, who told her to go to urgent care. (Tr. I: 67).

Claimant drove herself to urgent care, where she treated with Ms. Powell, a nurse practitioner. (Tr. I: 67; Ex. 13). Claimant reported experiencing ongoing but tolerable pain after feeling a pop in her back the day before while opening a safe at work, and that she developed severe pain and spasms in her back opening the same heavy safe that day. (Ex. 13-1-2). After examining claimant, Ms. Powell diagnosed back pain, back spasm, and back strain. (Ex. 13-2-3). An 827 Form restricted claimant to modified duty. (Ex. 13-5).

On that same date, claimant underwent thoracic and lumbosacral spine x-rays. (Ex. 14). The radiologist, Dr. Sabahi, noted that claimant had back pain after a pulling injury at work. (Ex. 14-1). The impression was a negative thoracic spine, minor anterior wedging and Schmorl's node deformity of L1 of uncertain etiology, but likely chronic, and focally advanced degenerative changes at L4-5 and L5-S1. (Ex. 14-2).

On the same day, the employer filed an 801 Form, noting that claimant had an ice pack and was complaining about back pain on Monday, March 29, 2021, due to home activities over the weekend. (Ex. 15).

April 19, 2021, claimant underwent a thoracic spine MRI, which was interpreted as showing a central T5-6 protrusion that indented the ventral thecal sac and contacted and deformed the spinal cord, as well as a similar smaller central T7-8 protrusion that indented the ventral sac and minimally contacted the spinal cord (which were ultimately described as very minimal degenerative changes at T5-6 and T7-8). (Ex. 17). There was also chronic L1 vertebral body height loss secondary to a Schmorl's node involving the superior endplate, which was described as a chronic L1 compression deformity. (*Id*.)

On April 23, 2021, Dr. Boone, a family medicine physician, evaluated claimant. (Ex. 20). Claimant reported a history of opening a safe at work on March 31 when she felt a pop in her back, as well as on April 1, after which she developed severe back pain and spasms. (Ex. 20-1). After examining claimant and reviewing her x-ray and MRI reports, Dr. Boone diagnosed a bulging thoracic intervertebral disc, back pain, and back spasm. (Ex. 20-1-2). He referred claimant to Dr. Kuether for a neurosurgical consultation. (Ex. 20-2).

On May 17, 2021, Dr. Boone noted that occupational health would take over for the workers' compensation matter. (Ex. 24). He diagnosed back pain and ordered a lumbar spine MRI. (Ex. 24-2).

On May 18, 2021, Dr. Radecki, a physical medicine and rehabilitation physician, performed an examination at SAIF's request. (Ex. 23). He recorded a history of claimant opening a safe door, which caused a popping sensation and back pain. (Ex. 23-2). He further noted that her pain was aggravated on the following day after opening the safe again. (*Id*.) Dr. Radecki found nonphysiologic presentation on physical examination and functional overlay with a history that he considered to be inconsistent with the medical record. (Ex. 23-9-10). Specifically, he explained that claimant had pain complaints with maneuvers

that could not possibly cause pain, and very nonphysiologic numbness of the upper limbs that could not possibly be related to her thoracic MRI findings. (Ex. 23-10). Dr. Radecki also diagnosed significant lumbar degenerative disc changes and less significant thoracic degenerative disc changes, which he considered to be arthritic and chronic. (*Id*.)

Also on May 18, 2018, Dr. Radecki found no mechanism of a reliable or significant injury concerning claimant's opening of the safe, which he described as sliding back and forth like a patio door might slide, rather than like a refrigerator door that opens. (Ex. 23-10-12). Moreover, he opined that nothing combined with the "work event" as there was no valid work injury based on claimant's inconsistent history and her coworkers' statements regarding how the safe door opened and closed. (Ex. 23-12).

On that same date, Ms. Smith, a SAIF investigator, performed "force testing" on the safe door at the employer's place of business. (Exs. 23A, 23B). The report noted two videos showing claimant's supervisor opening and closing the safe door and how the force testing was conducted with a force gauge. (*Id*.)

On May 27, 2021, SAIF denied the injury claim. (Ex. 25). Claimant timely requested a hearing. (Ex. 26).

In June 2021, Dr. Kuether, a neurosurgeon, evaluated claimant and authored a consulting opinion letter to Dr. Boone. (Ex. 26A). Dr. Kuether recorded a history of claimant experiencing ongoing severe pain when she injured her back after opening up a medicine cabinet or door. (*Id*.) Dr. Kuether reviewed claimant's thoracic MRI, noting that she had a small central protrusion at T5-6 and possibly at the T7-8 level, but was without evidence of significant spinal cord compression. (*Id*.) After considering these findings, Dr. Kuether diagnosed a thoracic strain and did not recommend surgical intervention. (*Id*.)

On August 18, 2021, Dr. Kuether signed a concurrence letter from claimant's counsel, noting that claimant had provided a consistent history of a mid-back injury while opening a safe on March 31, 2021, and then the following morning while opening the safe again. (Ex. 28). Dr. Kuether agreed that the history claimant provided to him was consistent with that provided to Ms. Powell, and that the mechanism of injury was consistent with a thoracic strain. (Ex. 28-1). He opined that the examinations and medications provided by Ms. Powell and Dr. Boone were reasonable, necessary, and caused in material part by the work incident. (Ex. 28-2). Moreover, Dr. Kuether concurred that Ms. Powell's

modified work release restricting claimant from heavy lifting was caused in material part by the safe opening incidents. (*Id*.) He opined that his own examination and review of claimant's MRI were also reasonable and necessary to treat or diagnose claimant's conditions arising out of the work incident. (Ex. 28-3). Dr. Kuether clarified that the fact that claimant injured herself by opening a safe door, rather than a medicine cabinet or door, was not of any significance to his assessment of the reasonableness or necessity of claimant's medical services. (*Id*.)

On that same date, Ms. Powell agreed that her examination, requested x-ray, and medications were reasonable and necessary medical services to diagnose and treat physical conditions arising out of claimant's work incident. (Ex. 29). Ms. Powell also agreed that claimant's heavy lifting restrictions that she provided in the 827 Form were due to claimant's work incident. (Ex. 29-1).

On August 19, 2021, Dr. Boone agreed that his physical examination, claimant's MRI, and the prescribed medications were reasonable and necessary medical services to diagnose and treat physical conditions arising out of claimant's work incident. (Ex. 30).

On August 25, 2021, Dr. Radecki signed a concurrence letter from SAIF's counsel. (Ex. 31). Although he now understood that the safe door opened on hinges like a refrigerator, Dr. Radecki considered the amount of force to open and close the safe to be minimal and extremely unlikely to result in any type of back or spinal injury. (Ex. 31-2-3). He based his decision, in part, on observations of a video taken of claimant's supervisor operating the safe door, as well as the forensic analysis performed by Ms. Smith. (Ex. 31-3).

Dr. Radecki found no diagnosable condition due to claimant's nonphysiologic responses on his examination aside from normal and expected age-related degenerative findings, and he discounted the spasm-type findings documented by Ms. Powell and Dr. Boone. (Ex. 31-4, -6-8). Thus, Dr. Radecki did not diagnose a sprain or strain condition. (*Id*.)

Referring to claimant's thoracic and lumbar MRI films, Dr. Radecki characterized the findings as incidental, chronic, and expected for someone of claimant's age and concluded that they did not show an injury-related cause. (Ex. 31-7). He opined that, due to claimant's nonphysiologic presentation, those findings did not appear to be causing or contributing to claimant's pain complaints or discomfort. (*Id*.) Therefore, Dr. Radecki concluded that claimant's work injury was not a material or major contributing cause of any disability or need for treatment for any back condition. (Ex. 31-7-8).

Dr. Radecki hypothesized that, if the work injury had resulted in a minimal back strain for which claimant had disability or a need for treatment, it would be as part of a combined condition. (Ex. 31-9). He explained that claimant had preexisting arthritic thoracic and lumbar spondylosis, which consisted predominately of degenerative disc disease and degenerative joint disease, affecting the joints of the spine. (*Id*.) Dr. Radecki opined that, if claimant's work event was a material contributing cause of her need for treatment or disability of a back strain then it would have combined with the active contribution from her preexisting condition (thoracic and lumbar arthritis) to cause or prolong her disability and need for treatment. (Ex. 31-9, -12). However, although he considered it not "totally impossible" for claimant's event to have "possibly had some contribution" to a need for treatment of the thoracic or lumbar pathology, Dr. Radecki concluded that claimant's preexisting condition was the major cause of any disability or need for treatment for that combined condition, rather than the "otherwise compensable injury." (*Id*.)

CONCLUSIONS OF LAW AND OPINION

The ALJ found that the opinions of Ms. Powell, Dr. Boone, and Dr. Kuether persuasively established that claimant's work injury was a material contributing cause of her need for treatment or disability. Nevertheless, the ALJ upheld SAIF's denial, reasoning that Dr. Radecki's opinion persuasively established that claimant had a combined condition, and that her otherwise compensable injury was not the major contributing cause of her need for treatment for the combined back condition.

On review, claimant contends that the opinions of Ms. Powell, Dr. Boone, and Dr. Kuether persuasively establish that her work injury was a material contributing cause of her need for treatment or disability, and that Dr. Radecki's opinion is unpersuasive. In response, SAIF contends that Dr. Radecki's opinion is the most persuasive and, therefore, that claimant has not established that her work injury was a material contributing cause of her need for treatment or disability. Alternatively, SAIF asserts a "combined condition" defense, relying on Dr. Radecki's opinion. For the following reasons, we set aside SAIF's denial.

To establish the compensability of her injury claim, claimant must prove that her work injury was a material contributing cause of her disability or need for treatment for her back conditions. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). If claimant establishes initial compensability, SAIF has the burden to prove that an "otherwise

compensable injury" combined with a statutory "preexisting condition," and that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

It is undisputed that this case involves complex medical questions that must be resolved by expert medical evidence. *See Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Robert Alexander*, 69 Van Natta 1472, 1475 (2017). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Ms. Powell, who examined claimant on the date of the incident and took a history concerning the mechanism of injury, found an area of firmness consistent with a spasm and diagnosed a back strain. (Ex. 13). She opined that her examination, requested x-ray, and medications were reasonable and necessary medical services to diagnose and treat physical conditions arising out of claimant's work incident. (Ex. 29). Ms. Powell also attributed claimant's heavy lifting restrictions noted in claimant's 827 Form to her work incident. (Ex. 29-1).

Consistent with Ms. Powell's opinion, Dr. Kuether opined that the mechanism of injury of opening a safe on March 31 and April 1 was consistent with a thoracic strain. (Exs. 26A, 28-1). He agreed that the examinations and medications provided by Ms. Powell and Dr. Boone were caused in material part by the work incident. (Ex. 28-2). Moreover, Dr. Kuether noted that Ms. Powell's modified work release restricting her from heavy lifting was caused in material part by the safe opening incidents. (*Id*.)

After examining claimant, reviewing her imaging studies, and obtaining a history concerning claimant's mechanism of opening the safe doors at work, Dr. Boone diagnosed a bulging thoracic intervertebral disc, back pain, and back spasm. (Ex. 20-1-2). Ultimately, like Ms. Powell and Dr. Kuether, Dr. Boone opined that his physical examination, claimant's MRI, and the prescribed medications were reasonable and necessary medical services to diagnose and treat physical conditions arising out of claimant's work incident. (Ex. 30).

We find the opinions of Ms. Powell, Dr. Boone, and Dr. Kuether persuasive. Specifically, Ms. Powell is in an advantageous position as she treated claimant on the day of the work incident. *See Anthony A. Miner*, 62 Van Natta 2538, 2540 (2010) (physician who treated the claimant after the work injury was in a better

position to evaluate his injury-related conditions than physician who examined him three months later). Moreover, the opinions of Ms. Powell, Dr. Boone, and Dr. Kuether were well reasoned and took claimant's particular circumstances into consideration. *See Somers*, 77 Or App at 263.

In contrast, we are not persuaded by Dr. Radecki's "material cause" opinion. Dr. Radecki opined that claimant's work injury was not a material or the major contributing cause of any disability or need for treatment for any back condition. (Ex. 31-7-8). In reaching this conclusion, Dr. Radecki found no diagnosable condition due to claimant's nonphysiologic responses on his examination, and he discounted the spasm-type findings documented by Ms. Powell and Dr. Boone, as well as their back strain diagnosis. (Ex. 31-4, -6-8). In doing so, Dr. Radecki explained that, if claimant had strained something in her mid-trunk, she would likely have more pain on one side or the other, rather than equally on both, as it was extremely rare to strain both sides of one's trunk at the same time. (Ex. 31-4).[1]

Thus, in reading his opinion as a whole, we consider Dr. Radecki's opinion to be primarily focused on whether claimant had findings that established a particular diagnosable condition (*i.e.*, a back strain), rather than whether claimant's work injury was a material contributing cause of her need for treatment. *See K-Mart v. Evenson*, 167 Or App 46, 49-50 (2000) (the existence of a particular disease or diagnosis is not necessarily required to prove the existence of a "compensable injury" under ORS 656.005(7)(a)); *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (claimant generally does not have to prove a specific diagnosis to establish compensability); *Sheryl L. Lane*, 62 Van Natta 2014, 2016 (2010). Under these particular circumstances, his opinion is unpersuasive.

Having found that claimant has established initial compensability, we turn to SAIF's burden of proof under ORS 656.266(2)(a). Although Dr. Radecki concluded that the "otherwise compensable injury" was not the major contributing

[1] In addition, unlike Ms. Powell, Dr. Boone, and Dr. Kuether, he considered the amount of force to open and close the safe to be minimal and extremely unlikely to result in any type of back or spinal injury. (Ex. 31-2-3). In reaching this conclusion, Dr. Radecki relied, in part, on observations of a video taken of claimant's supervisor operating the safe door at a time later than claimant's work injury, as well as the forensic analysis performed by Ms. Smith. However, Dr. Radecki did not further explain his opinion or indicate whether claimant's particular circumstances concerning the manner in which she specifically opened the safe door were considered. Under such circumstances, we discount his opinion. *See Sherman v. Western Employer's Ins.*, 87 Or App 602, 606 (1987) (little weight given to comments that were general in nature and not addressed to the claimant's particular situation); *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (conclusory and unexplained opinion found less persuasive).

cause of claimant's disability or need for treatment, he did not evaluate the relative contribution of the work-related condition to determine the major contributing cause of the disability or need for treatment for the combined condition. Specifically, although he disagreed with the opinions finding that claimant had a back strain due to the work incident, he subsequently hypothesized that such a strain combined with preexisting arthritic conditions. Moreover, based on what he determined to be nonphysiologic findings on examination, he did not consider claimant's work injury or claimant's preexisting conditions (which he described as "incidental") to be contributing to her need for treatment or pain complaints.[2]

On review of Dr. Radecki's opinion, we are not persuaded that he adequately weighed claimant's "otherwise compensable injury." *See Cummings v. SAIF*, 197 Or App 312, 318 (2005) (quoting *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995) (the assessment of the major contributing cause of the disability or need for treatment of a combined condition requires a comparison of the relative contribution of the preexisting condition and the work-related condition)); *see also Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) *aff'd, DS Water of AM., L.P. v. Prabucki*, 240 Or App 384 (2011) (where the claimant established an "otherwise compensable injury," physicians' opinions that the claimant's symptoms were not due to the work injury, when discussing a hypothetical "combined condition," did not adequately weigh the contribution of the work injury); *Haley M. Clowers-Romero*, 62 Van Natta 1090, 1097 (2010) (physician's hypothetical "combined condition" opinion unpersuasive because it did not adequately weigh the relative contribution of the claimant's work injury). Moreover, his opinion that claimant's preexisting condition was "incidental" does not support a conclusion, when weighed against the "otherwise compensable injury," that it was the greater contributor.

Under such circumstances, Dr. Radecki's opinion is not well reasoned and does not persuasively establish that the "otherwise compensable injury" was not the major contributing cause of the disability or need for treatment of a combined condition. *See Dietz*, 130 Or App at 401; *Somers*, 77 Or App at 263. Accordingly, the employer has not met its burden of proof under ORS 656.266(2)(a).

[2] We note that Dr. Radecki's opinion that the degenerative findings on MRI were "incidental" appears to conflict with his opinion that the preexisting conditions were "active contributors." Without further explanation, we discount his opinion. *See Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

There are no other opinions that support SAIF's position. Thus, because Dr. Radecki's opinion is unpersuasive, it is insufficient to establish SAIF's burden of proof under ORS 656.266(2)(a). *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (where the carrier has the burden of proof under ORS 656.266(2)(a), the medical opinion supporting the carrier's denial must be persuasive).

In sum, based on the aforementioned reasoning, the record persuasively establishes the compensability of claimant's back condition. Accordingly, we reverse.

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services is $17,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's briefs on review), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 13, 2022, is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for further processing according with law. For services at the hearing level and on review, claimant's attorney is awarded an assessed attorney fee of $17,000, to be paid by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on January 18, 2023